

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|-----------------------------|---|-----------------|
| DONNA CURLING, ET AL., | : | |
| | : | |
| PLAINTIFFS, | : | |
| vs. | : | DOCKET NUMBER |
| | : | 1:17-CV-2989-AT |
| BRAD RAFFENSPERGER, ET AL., | : | |
| | : | |
| DEFENDANTS. | : | |

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

MAY 24, 2019

10:30 A.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

TRANSCRIPT PRODUCED BY:

| | |
|---------------------------------|---------------------------------------|
| OFFICIAL COURT REPORTER: | SHANNON R. WELCH, RMR, CRR |
| | 2394 UNITED STATES COURTHOUSE |
| | 75 TED TURNER DRIVE, SOUTHWEST |
| | ATLANTA, GEORGIA 30303 |
| | (404) 215-1383 |

A P P E A R A N C E S O F C O U N S E L

**FOR THE PLAINTIFFS DONNA CURLING, DONNA PRICE, JEFFREY
SCHOENBERG:**

DAVID D. CROSS
CATHERINE L. CHAPPLE
ROBERT W. MANOSO
MORRISON & FOERSTER, LLP

HALSEY G. KNAPP, JR.
ADAM SPARKS
KREVOLIN & HORST, LLC

FOR THE PLAINTIFF COALITION FOR GOOD GOVERNANCE:

BRUCE P. BROWN
BRUCE P. BROWN LAW

**FOR THE PLAINTIFFS COALITION FOR GOOD GOVERNANCE, LAURA DIGGES,
WILLIAM DIGGES, III, AND RICARDO DAVIS:**

CARY ICHTER
ICHTER DAVIS, LLC

ROBERT ALEXANDER MCGUIRE III
ROBERT MCGUIRE LAW FIRM

FOR THE STATE OF GEORGIA DEFENDANTS:

VINCENT ROBERT RUSSO, JR.
JOSHUA B. BELINFANTE
CAREY A. MILLER
KIMBERLY ANDERSON
ROBBINS ROSS ALLOY BELINFANTE LITTLEFIELD, LLC

BRYAN P. TYSON
BRYAN JACOUTOT
TAYLOR ENGLISH DUMA

(...CONT'D...)

(...CONT'D...)

FOR THE FULTON COUNTY DEFENDANTS:

KAYE WOODARD BURWELL
CHERYL RINGER
DAVID R. LOWMAN
OFFICE OF THE FULTON COUNTY ATTORNEY

P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; May 24, 2019.)

COURTROOM DEPUTY CLERK: Morning, everyone. We're here for the telephone conference in the case of Curling vs. Raffensperger, Civil Action Number 17-CV-2989.

Beginning with plaintiffs, would you please make your appearance for the record.

MR. BROWN: This is Bruce Brown for plaintiff Coalition for Good Governance.

COURTROOM DEPUTY CLERK: Thank you.

MR. ICHTER: This is Cary Ichter for Coalition and certain individual voters.

MR. MCGUIRE: Robert McGuire, as well, for the Coalition.

COURTROOM DEPUTY CLERK: Okay. Curling plaintiffs? Are the Curling plaintiffs on?

MR. MANOSO: This is Rob Manoso from Morrison Foerster on behalf of the Curling plaintiffs. I will be joined by my colleagues, David Cross and Catherine Chapple, momentarily.

COURTROOM DEPUTY CLERK: Thank you.

State of Georgia?

MR. RUSSO: Yes. This is Vincent Russo, along with Carey Miller, State of Georgia. We have others on the phone too.

1 MR. TYSON: This is Bryan Tyson and Bryan Jacoutot
2 also on behalf of the State of Georgia.

3 MS. RINGER: For Fulton County, this is Cheryl
4 Ringer, Kaye Burwell, and David Lowman.

5 MR. BELINFANTE: This is also Josh Belinfante on
6 behalf of the State of Georgia.

7 COURTROOM DEPUTY CLERK: Thank you.

8 Did anybody else show up for Curling plaintiffs?

9 MR. RUSSO: This is the state defendants. We also
10 have Kimberly Anderson who is joining us.

11 COURTROOM DEPUTY CLERK: Okay. Thank you.

12 MR. KNAPP: Halsey Knapp also on behalf of the
13 Curling plaintiffs.

14 MR. SPARKS: Adam Sparks also on behalf of the
15 Curling plaintiffs.

16 MS. CHAPPLE: We also have Catherine Chapple, David
17 Cross, and Rob Manoso on behalf of the Curling plaintiffs.

18 MR. KNAPP: I'm in an airport. So I'm going to put
19 it on mute.

20 THE COURT: Who is that?

21 COURTROOM DEPUTY CLERK: Who just spoke?

22 MR. KNAPP: Halsey Knapp.

23 COURTROOM DEPUTY CLERK: Okay. Thank you.

24 Ms. Ringer for Fulton County, we're having a
25 difficult time hearing you. So if you would, speak clearly and

1 into the microphone, please, because we are taking this down
2 with a court reporter. So everybody please identify yourself
3 by name prior to speaking.

4 Judge?

5 THE COURT: Morning. I know it was ambitious to
6 think I was going to be able to speak with all of you on the
7 phone rather than have you in person. I'm not saying we won't
8 have to talk in person because of the volume of people. But I
9 just thought I might as well get the ball rolling.

10 Have you-all talked about a schedule together? I see
11 the notice of plaintiffs' proposed schedule. But have y'all
12 actually spoken together?

13 MR. BROWN: This is Bruce Brown, Your Honor. We have
14 not spoken about the schedule.

15 THE COURT: All right. Well, that makes things a
16 little tougher.

17 MR. RUSSO: Your Honor, this is Vincent Russo for the
18 state defendants. We have also just sent an email with a
19 proposed schedule.

20 THE COURT: All right. Let me just have Ms. Cole --
21 did you send -- did you file it, or did you --

22 MR. RUSSO: We emailed it to --

23 THE COURT: Mr. Martin?

24 MR. RUSSO: -- Mr. Martin, yes, ma'am, and to
25 counsel.

1 THE COURT: Let me get Mr. Martin to go print it
2 right now so that I can see it. All right?

3 MR. RUSSO: Yes, ma'am.

4 THE COURT: Let me ask a few other questions while
5 I'm waiting to see that. Right now plaintiffs are
6 anticipating, according to your filing, filing a motion for
7 preliminary injunction by next Friday, May 31st; is that right?

8 MR. BROWN: This is Bruce Brown. Yes, Your Honor.

9 THE COURT: Is that so also for the Curling
10 plaintiffs or not?

11 MS. CHAPPLE: Yes, Your Honor. This is Catherine
12 Chapple.

13 THE COURT: Well, let me ask you a few questions
14 about what you are seeking potentially. And, you know, this --
15 the question of the proper parties before the Court has arisen
16 here mostly in the context and originally in the context of the
17 preliminary -- the motion for preliminary injunctive relief in
18 the first -- let's say the first part of this case.

19 It wasn't an issue in the actual motion to dismiss.
20 But -- and I don't believe the plaintiffs have in any way
21 addressed for me what -- sort of the filing essentially that
22 was done by the defendants as to what the scope of the election
23 was, who was going to be in front of me, all of which, of
24 course, may have modified -- been modified some at this
25 juncture.

1 But there were -- you know, these were -- a lot of
2 municipal elections in November, a number of them being
3 nonpartisan. Almost all of them with just a few exceptions
4 being very small municipal elections. It is not clear to me at
5 this juncture what -- how the votes were going to be counted,
6 whether the cities were going to be using counting equipment,
7 whether they were going to be using county -- well, state
8 voting rolls, who was going to be -- whether the state was
9 going to be creating the ballot for them, any of these issues.

10 So I'm trying to understand how I'm going to be
11 properly presented with the issues in front of me in that light
12 and whether, in fact -- you know, it also -- the size of the
13 municipality or the county does matter in our just sort of
14 doing this and also whether you -- not having -- whether there
15 is an issue about having at least some representative number of
16 them in front of me so that I can actually have a better sense
17 of how this all plays down.

18 Let me interrupt that for one second. No email has
19 arrived in Mr. Martin's email box yet. Could somebody on
20 behalf of the defendants check to see that it has actually been
21 sent.

22 MR. RUSSO: Yes, ma'am, we will. We are
23 double-checking that right now.

24 MR. MILLER: Your Honor, Carey Miller.
25 Harry_Martin@gand.uscourts.gov?

1 COURTROOM DEPUTY CLERK: That is correct.

2 MR. MILLER: I'll resend just to be sure.

3 THE COURT: You probably have an email from him at
4 some point I would think. But if not, you can also send it
5 to -- you could include Ms. Cole. Do you have her email?

6 MR. MILLER: Yes, Your Honor. I believe we do.

7 THE COURT: Well, just include her in it. All right.

8 And I will say that some of that is information, of
9 course, I'm going to ask the defendants more about today. But
10 my point is that this has not -- is not something you've really
11 even addressed.

12 I think it is one thing to address it in the context
13 of a state election, national election where we understood
14 precisely -- or I thought I understood, even though, you know,
15 I realize that this was a defense raised by the state
16 defendants, but this is still potentially a different context.
17 And I don't -- I haven't heard a word from you about that. And
18 I'm a little worried about just plunging into your schedule,
19 not that you don't have the right to file whatever you want to
20 file, but without having a sense of this because it is
21 worrisome to me.

22 It just got here. I've got the state defendants'
23 proposed schedule now. All right.

24 MR. BROWN: Your Honor, this is Bruce Brown for the
25 Coalition plaintiffs. First, in terms of the motion for

1 preliminary injunction, I want to let you know that the
2 plaintiffs will be filing a single motion for the identical
3 relief and that we will -- for efficiency and to not overburden
4 the Court, we will be filing complementary briefs, two
5 different briefs. But they won't be duplicative, particularly
6 in light of the orders and the prior motions that have been
7 filed.

8 Second, with respect to your particular question
9 about the entities conducting the elections, yes, I think the
10 Secretary of State and the defendants have more information
11 about that. And also you're obviously correct in that the
12 previous motions had targeted statewide elections that had to
13 have the Secretary of State being so obviously in a prominent
14 role in terms of the execution of it. And we will address that
15 in our motions in terms of explaining how the relief that we're
16 seeking may be effected by the Court through the parties that
17 we have sued and joined and recognizing that the Secretary of
18 State, although it may not be at the same responsibilities with
19 municipal elections, does have substantial control over how
20 those elections are conducted. And the municipalities actually
21 contract with the Secretary of State to conduct those.

22 In addition, it is not only municipal elections that
23 will be coming up. There will be county elections throughout
24 Georgia. In fact, there are elections throughout the year in
25 counties. We don't always know them in advance because they

1 are for openings. Somebody retires, that kind of thing. So
2 there will be other countywide elections coming up.

3 Thank you.

4 THE COURT: Well --

5 MR. TYSON: Bryan Tyson for the Secretary of State.
6 I think as you have correctly identified while there are some
7 municipalities that will contract with a county to conduct an
8 election, those municipalities have complete control of how
9 they want to conduct that election. So they are free to
10 conduct the election using whatever method they so choose.

11 And there would obviously be -- if this Court were to
12 enjoin the use of electronic voting machines or something by
13 the state, that would have a significant impact on cities that
14 had already contracted towards that end. So I think having
15 those cities available would be necessary for you to get a
16 picture of what the order would look like, especially given the
17 autonomy that cities have regarding how they are going to
18 conduct their elections.

19 So I think your question is well placed, and I think
20 there does need to be some analysis of that point.

21 THE COURT: Has the Secretary of State's office
22 gotten an update since it filed its -- gave its filing on
23 April 22nd, 2019, Document 367, as to the cities and counties
24 having elections? Because I appreciated your provision of
25 Exhibit B to that that indicated basically what happened the

1 last comparable off-year election, which was a much longer list
2 than what was at this point that you filed the April 22nd
3 submission -- what you were aware of at that point.

4 Do you have any idea --

5 MR. RUSSO: Your Honor --

6 THE COURT: Go ahead.

7 MR. RUSSO: Your Honor, this is Vincent Russo. We do
8 have an updated list as of yesterday that we can submit to the
9 Court. And in short though, there are four additional county
10 commission elections, two in Carroll County, one in Coffee
11 County, one in Fulton County, and a city of Talbotton, city
12 council in Talbot County, and clerk of superior court race in
13 Webster County. So total that is four different counties that
14 would have additional anticipated elections.

15 From what I understand, all but the Fulton race --
16 the anticipated election dates for those races except Fulton is
17 June 18. Fulton can maybe shed some light on the anticipated
18 election date for that county commission district six seat. My
19 understanding though is that it is -- the election date is
20 set -- anticipated date would be September 17.

21 MS. RINGER: (Unintelligible).

22 COURT REPORTER: I cannot hear Fulton County.

23 THE COURT: Is that Ms. Ringer?

24 MS. RINGER: Yes. I'm moving (unintelligible).

25 THE COURT: Can you pick up the phone?

1 MS. RINGER: Can you hear me better now?

2 THE COURT: A little. Are you on the phone now?

3 MS. RINGER: Yes.

4 THE COURT: Say what you were stating again.

5 MS. RINGER: So we did have a commissioner that
6 passed away. So we're having a special election. So the date
7 that Mr. Russo said is correct. That is our commission
8 district six.

9 THE COURT: So that is September 17?

10 MS. RINGER: Yes.

11 THE COURT: All right. And all of the others are
12 June, Mr. Russo?

13 MR. RUSSO: Yes, ma'am. All the others would be
14 June 18. All of the new ones that we were just made aware of.

15 THE COURT: Well, can -- Mr. Tyson or Mr. Russo, are
16 you in the position to elaborate any further about how many --
17 the scope of your knowledge as to how many of the entities have
18 contracts with either the county -- with the counties for the
19 provision of voting machines and also for use of -- for access
20 to the state voting database?

21 MR. RUSSO: Your Honor, this is Vincent Russo. I
22 believe in the submission that we made with the Court in April
23 it indicates -- there is the column for county conducted. So
24 if it is county conducted, then that means the county would
25 have contracted with the city if it is a municipal race. All

1 of the new -- all of the races that I mentioned on this call,
2 the new ones, those are all county conducted also.

3 THE COURT: All right. So when we have a blank like
4 for the -- I mean -- I'm assuming some of the times it may be a
5 mistake. So we have a city in Gordon County, which is still
6 very tiny, I know -- the city council post two, it indicates
7 yes. So it is county run, but then the other positions in --
8 there are two more in Fairmount, which are blank.

9 MR. RUSSO: Yeah. I think those are all municipal,
10 and I believe that those should all be yes. I'll have to
11 double-check the city of Plainville. There appears to be a
12 mayor and two city council races in Gordon County there that we
13 had blank. I believe those -- I will double-check. But I
14 believe -- okay. So we'll double-check that.

15 THE COURT: All right. If you will just double-check
16 them because there were some inconsistencies like this. But
17 let's just, for instance, talk about -- and obviously different
18 cities in the county can decide to do different things. But
19 for the city of Clarkesville, which has two positions, post two
20 and three, and a number of these other cities and towns in
21 Habersham, what is your -- what happens in a place like this
22 where they indicate -- well, you've indicated that they don't
23 use the resources of the county.

24 MR. RUSSO: Your Honor, this is Vincent Russo again.
25 Where the city doesn't contract with the county to use the

1 county's voting equipment, then the city has its own. They can
2 use -- they may have procured their own equipment, DREs. They
3 may have used the optical scan ballots. They can really use --
4 it is a wide range of what they might have.

5 THE COURT: Well, how do they determine who is a
6 registered voter?

7 MR. RUSSO: They still operate off of the state's
8 voter registration list. So the voter registration list is
9 separate and apart from the election equipment that they are
10 using and the actual running of the election.

11 THE COURT: So they use ExpressPoll to be able to log
12 in to the state's computer system to be able to -- and
13 registration system? Is that how it works?

14 MR. RUSSO: No, ma'am. I mean, I'm not saying they
15 necessarily use ExpressPoll. They might get the printout of
16 all the registered voters similar to what precincts get in
17 state elections as their backups. So they could have a binder
18 with everybody in it and check it off. But they -- they
19 ultimately get the information. It still comes out of eNet
20 though, which is the voter registration system.

21 THE COURT: And is eNet -- I'm sorry for the
22 confusion. But is eNet generated through the state
23 registration -- voter registration system?

24 MR. RUSSO: Yes, ma'am.

25 THE COURT: All right. And so they are tapping into

1 that then in some way?

2 MR. RUSSO: Well, it might be that the county
3 provides the list of registered voters in the city. But yes,
4 everybody when they -- when the various combos of information
5 get put into the state's voter registration system to indicate
6 where someone lives, what municipality, what county, which
7 district, so on and so forth -- that all still comes out of the
8 state's voter registration system.

9 So when individuals go to vote in a municipal
10 election, they -- even if a municipality is running it, they
11 are looking at whether the individual is registered to vote
12 through information obtained from the state. Now, they may
13 still use different election equipment to run elections. But
14 voter registration is run through the state. Because the state
15 has a statewide voter registration system.

16 THE COURT: Right.

17 MR. RUSSO: Your Honor --

18 THE COURT: Yes.

19 MR. RUSSO: Sorry. I was going to point you to
20 Document 367. It is the state's response to the April 16,
21 2019, order. And in that document on Page-- on Page 7 and 8 is
22 an explanation around this.

23 THE COURT: Well, I'm just trying to understand. In
24 performing these functions, are you typically working with the
25 county or the municipality or both?

1 MR. RUSSO: I mean, the state is -- if you are
2 referring to the voter registration system --

3 THE COURT: Well, I'm referring to the functions that
4 are in the bullets on Pages 7 and 8 of Document 367.

5 MR. RUSSO: Okay. So if the municipality is
6 contracting with the county through the contractual
7 arrangement, the county will prepare the ballots and prepare
8 the GEMS database and, you know, the election day operations,
9 the ExpressPoll testing of the machines, and essentially the
10 election day activities that most voters interact with.

11 The voter registration system is simply just the
12 county -- even if the county is conducting the election or not,
13 the county is still preparing the list of voters that is used
14 in a municipal election. In a scenario where the municipality
15 is running its own election, then the municipality handles all
16 of the election, the voting activities where, you know,
17 whatever kind of equipment they use -- you know, if they use
18 their own DREs, they prepare those DREs. They handle the back
19 end of running the election. But they would still -- the
20 municipality would still get its voter registration list from
21 the county.

22 THE COURT: All right.

23 MR. RUSSO: Does that help explain?

24 THE COURT: Yes, it does. And do you know whether
25 any of the municipalities do hand voting already? Basically a

1 written ballot?

2 MR. RUSSO: Sure. I'm not aware of any counties that
3 currently have just an all paper ballot system. But that is
4 not to say there aren't counties -- excuse me. I didn't mean
5 counties. I meant municipalities. But that doesn't
6 necessarily mean there aren't any.

7 There are some very small municipalities where they
8 may have everybody come in and vote on a paper ballot that they
9 print out. It is very possible.

10 THE COURT: All right. I'm just looking at the state
11 defendants' schedule at this time.

12 **(There was a brief pause in the proceedings.)**

13 THE COURT: Why is it important to the plaintiffs to
14 have an answer filed by next Wednesday?

15 MS. CHAPPLE: Your Honor, this is Catherine Chapple
16 for Curling plaintiffs. We would like to get this going as
17 quickly as possible. The defendants have had our filing since
18 last year. We just don't believe that there is a need for them
19 to have until June 4. We think they should be able to respond
20 earlier than that. So we would like it next week.

21 And, Your Honor, this is Catherine Chapple again. As
22 long as it doesn't slow down discovery, if Your Honor would
23 prefer to have the answers June 4, we are fine with that. But
24 we just don't want it to be slowing down discovery at all.

25 THE COURT: I have already ordered that discovery

1 would commence. So I don't know that -- how it would delay
2 anything.

3 MS. CHAPPLE: Yes, Your Honor.

4 THE COURT: So the difference in your positions about
5 the fact discovery is that the close of fact discovery for the
6 plaintiffs would end November 22nd and for the state defendants
7 October 11 and then expert discovery --

8 MR. CROSS: Your Honor, this is David Cross for
9 Curling plaintiffs, if I could help.

10 THE COURT: Yes.

11 MR. CROSS: The reason for the difference in the end
12 of fact discovery -- I mean, in an ideal world, we would
13 actually have fact discovery ending closer to their time or
14 even their time. But the challenge is almost my entire team,
15 including myself, have a trial in Utah that is going to run
16 about a month, at least three weeks beginning September 13.

17 And so that is unfortunately what had us pushing out
18 fact discovery a little while because we just won't have the
19 resources to be working in that final month of fact discovery
20 if it closes right when our trial ends.

21 I imagine there will be depositions and things going
22 on at that time. As I told Bruce, I don't think Bruce wants to
23 be handling those alone. So if we could push that out a month
24 that at least ensures that we are free for that final critical
25 month.

1 The only other issue that I have with their
2 schedule -- the expert period, I think, is fine as long as
3 again it builds off when the fact discovery ends. It looks
4 like we're kind of in the same range. The only issue I have
5 beyond the fact discovery issue is the dispositive motions.
6 This is a bench trial. This is an injunction. There is no
7 need for dispositive motions here. It is just forcing the
8 Court to litigate the same issues twice. And there is no
9 reasonable jury standard here. I'm not even sure what their
10 dispositive motions would look like.

11 They are asking you to pre-decide how you are going
12 to ultimately decide or how you might ultimately decide the
13 merits issues in the case without a whole robust, fulsome
14 evidentiary presentation.

15 So we didn't have that built in because it just makes
16 no sense in my view to have Your Honor do that on an injunctive
17 relief case where you're the one who is the ultimate fact
18 finder. We should just move directly to that.

19 MR. BROWN: Your Honor, this is Bruce Brown for the
20 Coalition plaintiffs. And we agree with what Mr. Cross said.

21 In addition, the later date that the plaintiffs have
22 proposed is more realistic in light of the fact that we're also
23 going to be challenging the state's new system, should it be
24 purchased. And we will need to have access to those -- to
25 discovery to that new system. And so if that was all available

1 now, it might be different. But as it is likely to come in in
2 the fall or late summer or fall at the earliest that the
3 November -- the end of November, November 22nd date, just I
4 think embraces a more realistic scenario in light of the
5 anticipated access to that equipment.

6 MR. TYSON: Your Honor, this is Bryan Tyson for the
7 Secretary of State. During our April 9 conference in front of
8 you, I thought we all established that this case was about DREs
9 and that this was not about any potential new system, that this
10 case was about DREs, and was going to involve that. And we
11 have prepared a discovery schedule and a schedule for motions
12 that fits on the claims in the plaintiffs' complaint.

13 The plaintiffs have not filed an amended complaint.
14 They have said they don't want to file an amended complaint.
15 And so this is the first I'm hearing and Mr. Brown saying that
16 now we're also -- they are also planning to challenge the new
17 system when they specifically said they were not raising those
18 issues in the conference before you last month.

19 MR. BROWN: Your Honor, we were at a different
20 hearing because we presented very detailed reasons I think in
21 writing as well as to why we were challenging both the DREs now
22 and the BMDs later and that we also showed in response to
23 questions how our challenge to the BMDs was comfortably
24 embraced by the allegations in our current complaint.

25 And so yes, we do -- in terms of looking ahead, the

1 first focus and intense focus will be on the DREs. And we will
2 have a lot of discovery then before the state, if it does,
3 purchases the new equipment. But the new equipment is in the
4 case and will be the subject of our discovery efforts.

5 THE COURT: Well, let me just say I thought I heard
6 something different from both of you. And all of this is
7 making me very anxious.

8 MR. CROSS: Your Honor, David Cross, if I might be
9 able to help. I wonder if we can just park the issue of the
10 BMDs. I think it would behoove the parties to have an
11 opportunity to talk through that and see where both sides are
12 on it.

13 We still haven't -- they are still in the process of
14 rolling out whatever it is they are going to roll out. They
15 are still in the process of figuring out the pilot testing of
16 that. So I think as that crystallizes both sides can get a
17 better sense of what is within the scope of this case and what
18 kind of discovery the plaintiffs might look for, what positions
19 the defendants might take.

20 For the sake of today's call, I would suggest that is
21 not something that needs to get resolved because I don't think
22 it drives the schedule. I understand Mr. Brown's point. And
23 I'm not disagreeing with him that it could ultimately have an
24 impact on the schedule.

25 As I said earlier, I'm a little bit selfish about

1 this. I apologize, but we do have that trial. So that pushes
2 the schedule out regardless for us to make sure the fact
3 discovery works and that everyone on our side of the case has
4 the resources.

5 So it doesn't seem we're that far apart on the
6 schedule as long as the defendants are willing to work with us
7 on the fact that my team has this trial. I think we can
8 probably get to where we need to be. The only issue is the
9 dispositive motions, and I'm not sure Your Honor has to decide
10 that now either. We could work out a schedule that gets this
11 trial ready. But I do just think that should be an obvious
12 nonstarter in a case where they are asking Your Honor to
13 basically do the same thing twice, once on a truncated written
14 record and then another trial. It just doesn't make sense.

15 MR. BROWN: Your Honor --

16 THE COURT: I suggest that everyone needs to look
17 over the transcript again. I mean, maybe what -- everyone just
18 maybe peaceably went their own way in construing what was said
19 there. But -- and I will look at it too.

20 But I'm -- I think, Mr. Cross, there is something
21 that you said that is correct, that there's some things that
22 don't have to be resolved now. But the structure as a whole
23 that is in front of us seems important because, for instance,
24 let's say -- let's say there is an amended complaint even and
25 that there is -- that challenges something else and it is

1 allowed here or let's say it is a related case because it is
2 associated with this case. You know, there are a variety of
3 possibilities. Or, of course, you could have Mr. Brown's
4 possibility that it is all -- in his view everything is
5 embraced within it.

6 I'm going to go back now since we've had such very
7 different views about what happened at the hearing. I'm going
8 to read the transcript myself. But I think that affects
9 obviously what is going to happen down the line. And I -- as
10 it is, I'm very concerned about what the plaintiffs are about
11 to file right now.

12 And yes, you could address all of the issues that
13 I've raised right now in what you are filing. But it sounds to
14 me like -- my concern is it doesn't sound to me from anything
15 that the plaintiffs have told me that you're at this point
16 prepared to address that.

17 And, you know, I've given a lot of careful thought to
18 this case. But I don't really understand what you're preparing
19 at this point to throw us into. And I will tell you I am not
20 available in the first three weeks of July. So I am kind of --
21 you know, maybe I don't read the press clippings enough. I did
22 see that you indicated today in some announcement that this was
23 your plan.

24 But I am somewhat trying to understand what would it
25 even mean to have a -- whether a trial on the merits or a full

1 preliminary injunction motion with all of these different
2 entities if you don't have that much information about what
3 they are actually doing.

4 MR. BROWN: Your Honor, this is Bruce Brown. We have
5 tried to be -- tried unsuccessfully to be clear about how we
6 view the litigation going forward. The way we view it is that
7 first the DREs need to be enjoined. Their use needs to be
8 enjoined statewide. And that would be parallel to additional
9 fact discovery for the DREs and then, if they ever get
10 purchased, for the BMDs.

11 And then as we will explain in our motion papers, the
12 benefit of enjoining the use of the DREs now is that it
13 provides the state the opportunity to get a backup plan in
14 place in case the eventual installation of the new system gets
15 delayed when we're in the chief of the 2020 elections.

16 In terms of how that all plays out with Your Honor's
17 schedule, we anticipate also moving to enjoin the use of the
18 the BMDs. That is down the road. They haven't been purchased
19 yet. So we -- based upon what we know of their options, we
20 think they are -- they should be enjoined and that when we move
21 for that injunction the state will be using hand paper --
22 hand-marked paper ballots.

23 And so we seek moving to enjoin the DREs
24 preliminarily and then permanently and then also seeking to
25 enjoin either preliminarily or permanently or both or in

1 sequence the BMDs. And so that is what we intend -- intend to
2 file. And the facts change, as has been recognized, with the
3 state's actual implementation still being uncertain. But that
4 is what -- the way we see it working. And, anyway, that is
5 what we see working.

6 MR. CROSS: Your Honor, this is David Cross for the
7 Curling plaintiffs. That's generally right. The motion that
8 we anticipate filing next week, the preliminary injunction,
9 will focus only on the DREs. That is the system as Your Honor
10 may recall at the last hearing we talked about. That is the
11 system that is in place. That's the system that will be used
12 in at least some, if not all, of the elections that are coming
13 up this year. And that's the system that we believe we have
14 shown already and certainly will show in a new filing that
15 voters in Georgia need relief from, including in the counties
16 that are before you. We just heard that Fulton County itself
17 has an election coming up.

18 THE COURT: Yeah. But they are going to have the
19 election -- all right -- one seat. And some of these other
20 elections are in June. I'm just -- you can keep on going. You
21 can complete your thought.

22 MR. CROSS: If your point is that these are small
23 elections, that is true in terms of the scope and probably the
24 voter turnout. But that actually is why we think this is the
25 perfect time to do this. As we read Your Honor's decision from

1 September, what really had us lose that was just the timing,
2 the scope, the complexity, and the magnitude of the midterm
3 elections. And we completely understood Your Honor's concerns
4 about that.

5 We're now in a position where all of the same
6 vulnerabilities are still in place. All the same concerns that
7 Your Honor seemed to validate at least in some respects in that
8 order are still in place for each of the elections going
9 forward using that system, those machines. And now we don't
10 have any of the feasibility concerns that were raised before.

11 These are much smaller elections. They are more
12 focused. It is much easier to roll out paper ballots and to
13 show that this is a system that can get in place. And if we
14 can get that relief in place now, then by the time we're before
15 you on a permanent injunction -- you know, it is sort of like
16 what they are doing with the BMDs. Right. They want to roll
17 it out. They want to test it. They want to pilot it and show
18 that it can be done.

19 This is the same for us. We want to show that this
20 can be done. This is the time to do it. It has the benefit of
21 getting protections in place that are needed for any election.
22 No matter how small an election is it still matters. We want
23 to know that the results are what the voters intended. And it
24 lets us get -- you know, to show that this can be done.

25 So by the time we're looking at primaries next year

1 and by the time we're looking at the presidential election and
2 statewide elections next year, we're in the place to be able to
3 do that across the state.

4 The BMDs point, again, for me that is down the road.
5 We'll see what it is they are going to do. We'll take a hard
6 look at that, and we'll figure out what concerns, if any, we
7 have with that. We anticipate having significant
8 constitutional concerns just based on what we have seen.

9 But the focus right now is the system that is in
10 place. And we have a system with upcoming elections where the
11 voters walk away, as we have shown before, without confidence
12 that what they voted is what is actually coming out as
13 certified results.

14 There's no feasibility issues because these elections
15 are pretty small. In fact, I mean, even on the counting, a lot
16 of these probably can be hand counted. We don't even need to
17 get to the issue of scanners because of the voter turnout
18 you're talking about. But, of course, they have the right to
19 count them with scanners if they want to. And we have shown
20 they have sufficient scanners to do that.

21 So the timing is perfect to do this on a preliminary
22 injunction basis, and we still think it is as critical now as
23 it was last fall.

24 MR. RUSSO: Your Honor, this is Vincent Russo. You
25 know, we will respond to the preliminary injunction motion

1 whenever they file it. However, you know, I will point out
2 that the public policy behind your decision last year is the
3 same then as it is now, except now we will be putting all the
4 cost and burden on the municipalities if they were enjoined
5 preliminarily from using the DREs and contracting with the
6 counties. And, of course, there is a proper party issue that
7 you raised.

8 One other point I just wanted to make regarding the
9 scheduling and our schedule. We tried to work off of the prior
10 schedule that defendants -- excuse me -- that plaintiffs
11 submitted in April -- on April 15 in Document 364. I mean, we
12 all have trials and other things going on this year and into
13 next year. But our schedule that we proposed, we were working
14 off of that trial readiness date in December that was
15 originally proposed by the plaintiffs and the timing of the
16 expert reports and close of discovery.

17 THE COURT: Okay. I'm going back to look at their
18 original schedule.

19 MR. RUSSO: It is Document 364 for your reference.

20 THE COURT: Thank you.

21 MR. BROWN: Your Honor, what Mr. Russo said is
22 partially correct except that that proposed schedule is dated.
23 And that was submitted, you know, a month ago. And so our
24 proposed schedule anticipates the same duration. And
25 Mr. Russo's proposed schedule anticipates a month shorter

1 duration.

2 MR. RUSSO: I mean, you know -- Your Honor, this is
3 Vincent Russo. We are on a four-month discovery track as far
4 as we know. And the plaintiffs have wanted to move this case
5 forward. We are -- defendants are trying to get this case to
6 move forward and trying to get it on track so that we have a
7 process that it can follow just like regular litigation.

8 And the plan that plaintiffs are now proposing pushes
9 this into 2020, and it is still unclear to us what is going to
10 happen with the ballot marking devices, and that will be an
11 issue that sounds like it is going to have to come up.

12 THE COURT: All right. Well, you know, I think it is
13 very hard for me to know without knowing the shape of the case
14 at this juncture, candidly. So -- but, you know, I do think
15 that you-all need to start picking up the phone with each other
16 more. I mean, in terms of, for instance, just even the
17 question of having a Rule 26 conference, putting that off to
18 the week of June 10 seems late under the circumstances.

19 MR. RUSSO: Your Honor, this is Vincent Russo. We
20 dropped off the call right after I finished speaking a minute
21 ago.

22 THE COURT: That's fine. I'm sorry. So what I was
23 saying was I do think that you-all need to pick up the phone
24 more and talk because -- and I think that delaying having a
25 Rule 26 conference to the week of the 10th and initial

1 disclosures until the week of the 24th -- I mean, you are
2 obviously in kind of it seems to me -- it seemed late for
3 purposes of these proceedings and making sure we can actually
4 get -- get moving.

5 I'm going to look at both of the schedules again.
6 Tell me what your schedule is come Wednesday, Thursday, and
7 Friday. Because I'm not sure I don't need to see you-all in
8 person. So you don't have to tell me all individually now.
9 But please email Mr. Martin immediately after this phone
10 conference so that I know whether -- I mean, obviously the
11 people representing Fulton County and the state defendants are
12 here. But that doesn't mean that you're always available
13 either.

14 So I would not make anyone think about traveling on
15 Tuesday. But I would like to know your availability for an
16 in-person conference on Wednesday, Thursday, or Friday.

17 MR. RUSSO: Yes, ma'am. This is Vincent Russo. We
18 will do that. We think a 26 conference would be helpful for
19 the parties to start working through discovery issues. We are
20 happy to push it forward and have it earlier. Frankly, that
21 was just my selfishness because I'm having a child on June 5th.

22 THE COURT: That's not selfish if you are having --
23 you are positive of that date?

24 MR. RUSSO: Well, that is the date it is scheduled.
25 We'll see.

1 THE COURT: I just had one of my law clerks have a
2 baby -- his wife had a baby. He didn't do it. But nothing
3 went, of course, exactly as the plan. That is the only thing.
4 But sometimes they do. So that's a big deal. And
5 congratulations.

6 MR. RUSSO: Well, thank you. I appreciate it. We'll
7 make it work out with whatever works with you, Your Honor.

8 THE COURT: All right. Well, let me know. Ms. Cole
9 indicates that she's not here on Wednesday. So I would -- let
10 me just know about Thursday and Friday because I would prefer
11 to do this while she is here.

12 MR. RUSSO: We will do that.

13 THE COURT: And I know that the plaintiffs want to be
14 filing their motion then. But I am -- it is not that I think
15 that every municipality has to be here. But -- but I'm
16 concerned about this. And I haven't heard anything that --
17 about kind of the posture of the case. And I will just throw
18 one other thing out because, you know, what I have done is rule
19 on a motion to dismiss just now, and I have also ruled, of
20 course, on a record last September.

21 Now, I don't think the DREs are going to change their
22 face in the sense of the outdated software or some of these
23 issues. On the other hand, we are dealing with very small --
24 and I understand the reasons what plaintiffs are arguing. But
25 I will say that, you know, I don't know what anything else has

1 been done in terms of shoring up the system. I don't know that
2 it can transform the problems with the DREs.

3 But, you know, there were many different things that
4 I considered in making my determination last year. So it is a
5 little more complicated than plaintiffs say.

6 And did somebody drop off again?

7 MR. RUSSO: Not the state defendants this time. The
8 state defendants are here.

9 MR. BROWN: Plaintiffs are here.

10 THE COURT: And, you know, I know you don't want --
11 on one hand, it sounds like plaintiffs aren't worried about
12 this, and you are just basically pushing ahead. But everything
13 takes time. And, you know, whether this -- whether this
14 schedule really makes sense in terms of what the plaintiffs
15 believe the case is about or my availability or your
16 availability or being able to do this properly is a -- is a
17 real question in my mind and it is -- whether we should be
18 moving faster on some things or slower on others, these are --
19 everyone has, it sounds like, a very complicated schedule in
20 the next period of time. And this does involve a public
21 interest.

22 So I'm just leery of getting myself into a --
23 basically framing myself into a box that doesn't work. And so
24 I want to think a little more about what you've presented and
25 what you've explained. And I think that the plaintiffs ought

1 to think about some of the things that have been spoken about
2 also at this hearing today by phone, and I'll look at your
3 schedules and then decide how we're going to proceed. If you
4 could let us know by 1:00 what your schedules are.

5 MR. CROSS: Your Honor, this is David Cross. The
6 only day next week that works for us -- for the Curling
7 plaintiffs is Friday. If that works for others, we should just
8 go ahead and schedule something. Because unfortunately I'm
9 traveling Thursday and Wednesday with a client.

10 THE COURT: Well, why doesn't everyone let me know
11 whether Friday works, and I'll look at our schedule. I'm not
12 going to do this by phone.

13 MR. CROSS: Your Honor, one other issue we just
14 wanted to float for Your Honor to consider is: Just based on
15 the dealings we've had with the other side to date, we
16 anticipate there's probably going to be significant discovery
17 fights. We wanted to raise whether Your Honor thought it might
18 be useful to the Court to bring in a magistrate or
19 alternatively a special master but someone who could take some
20 of that off your plate and move things quickly, particularly
21 given Your Honor said you are going to be out of pocket for a
22 few weeks over the summer. So an idea to float for your
23 consideration.

24 THE COURT: All right. Well, I will certainly
25 consider it. It is a little hard to consider in the abstract

1 without your delineating for me what you think the discovery
2 might be.

3 MR. CROSS: Understood. We'll lay that out.

4 THE COURT: When?

5 MR. CROSS: Well, we could do it -- well, whenever
6 the hearing is we can do it. Or do you want us to file
7 something in advance? How would you like us to do that, Your
8 Honor?

9 THE COURT: I think if you would -- I'm not asking
10 you to file the discovery. But I think you should at least
11 delineate the nature of the discovery, the scope of the
12 discovery you're seeking so that we have something concrete
13 we're talking about.

14 MR. CROSS: Absolutely. We can do that.

15 THE COURT: If you could do that by Wednesday
16 morning. Can you do that?

17 MR. CROSS: Yes, Your Honor.

18 THE COURT: All right. Is there anyone on the
19 defendants' side who knows -- that is critical that knows that
20 Friday is just not going to work?

21 MR. RUSSO: This is Vincent Russo. I think -- I'll
22 defer to Mr. Tyson on whether he is available. I think we are
23 available then.

24 THE COURT: All right.

25 MR. TYSON: Your Honor, this is Bryan Tyson. We are

1 available. Me and Mr. Jacoutot are available on Friday as
2 well.

3 THE COURT: All right. Well, Harry, what is Friday?

4 COURTROOM DEPUTY CLERK: I'll have to look.

5 THE COURT: All right. Well, anyway, why don't we
6 just hold Friday for now, and we'll be in touch with you. I
7 still would like you-all to confirm that you have no problems
8 with Friday by writing.

9 COURTROOM DEPUTY CLERK: We have a 10:30 revocation.
10 We can do it in the afternoon.

11 THE COURT: So it looks like we'll probably be able
12 to do it in the afternoon. So hold Friday afternoon. And we
13 will -- but everyone should just confirm their availability
14 meanwhile and write Mr. Martin as soon as you can. In any
15 event, no later than 1:00 P.M.

16 MR. CROSS: Yes, Your Honor.

17 MR. RUSSO: Yes, ma'am.

18 THE COURT: Thank you very much.

19 MR. RUSSO: Thank you, Your Honor.

20 MR. CROSS: Thank you.

21 MR. TYSON: Thank you, Judge.

22 **(The proceedings were thereby concluded at**
23 **11:29 A.M.)**

24

25

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 36 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 28th day of May, 2019.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT